Radin Ibrahim bin Gusti Yassar v Public Prosecutor

HIGH COURT (SIBU) – CRIMINAL APPEAL NO 19 OF 1987
CHONG SIEW FAI J
24 MARCH 1988

Criminal Procedure – Sentencing – Six months' imprisonment for housebreaking by night in order to commit theft – Whether mitigating factors had been adequately considered – Custodial sentence mandatory for such grave offences – Penal Code (FMS Cap 45), s 457 – Criminal Procedure Code (FMS Cap 6), ss 173A & 294

The appellant pleaded guilty to the offence of housebreaking by night in order to commit theft. He was sentenced to six months' imprisonment. The appellant appealed against the sentence of imprisonment, contending that the trial court failed to adequately consider that the appellant was a first offender, a responsible person of good character having a family to support, had co-operated with the police, had pleaded guilty, had shown remorse and asked for leniency.

Held, dismissing the appeal: (1) All the mitigating factors had been properly considered by the learned trial magistrate and the sentence is not manifestly excessive or severe.

(2) Under s 457 of the Penal Code, some sentence of imprisonment is mandatory unless provisions in the Criminal Procedure Code such as s 173A or s 294(i) are considered appropriate and resorted to. The learned trial magistrate was justified in deciding that this was not a proper case to invoke s 294 of the Criminal Procedure Code.

(3) The gravity of the offence of housebreaking by night in order to commit theft is reflected by the provision of the imprisonment term in the Penal Code which may extend to 14 years. The offence deserves fairly severe punishment and offenders must expect custodial sentences. The six-month custodial sentence of the trial court is affirmed.

Legislation referred to
Criminal Procedure Code (FMS Cap 6) ss 173A, 294
Penal Code (FMS Cap 45) s 457

Appeal from: Criminal Case No 2272/1984 (Magistrate's Court, Sibu)

Siti Aishah bte Othman (Deputy Public Prosecutor) for the respondent.
Appellant in person.

Cur Adv Vult

Chong Siew Fai J: On his own plea of guilty, the appellant was convicted of the offence of housebreaking by night in order to the committing of theft and was sentenced to six months' imprisonment. Pursuant to s 426(i)(b) of the Criminal Procedure Code, he was also ordered to pay the complainant a sum of $1,500 by way of compensation. As there is no appeal against the latter order, nothing more need be said about it. In any event, as stated by the appellant in the appeal, it had not yet been paid. The appeal is against the sentence of imprisonment.

The facts of the case as admitted by the appellant establishes that on 28 July 1984 at about 2.00am the appellant then aged 35 years committed the offence by breaking into the dwelling house of the complainant and stole $1,500 cash, some ornaments, a gold coin, cheque books and some foreign currency. He pawned the ornaments, sold the gold coin and used up the moneys derived therefrom as well as the cash stolen. The cheque books were thrown into the Rejang river. Nothing was revealed as to what was done to the foreign currency. The ornaments, however, were subsequently recovered.

The appellant's plea of mitigation was short and of personal nature. He was married with five children who were schooling and had also to support his wife and his aged mother. He asked for leniency and expressed hope that custodial sentence would not be passed.

I find no substance in the complaints stated in the petition of appeal (most of which were also repeated in this appeal) that the learned trial magistrate had failed to adequately consider that the appellant was a first offender, a responsible person of good character having a family to support, had co-operated with the police, had pleaded guilty, shown remorse, and had asked for leniency. All these matters had been properly considered by the learned trial magistrate. As regards the loss of job and pension, this was not pleaded in mitigation and accordingly constitutes no valid ground of complaint that the learned trial magistrate had failed to consider it. As for me, I find this ground insufficient to interfere with the sentence of the lower court.

In respect of the complaint of the lack of statistics in the number of theft and burglary cases in Sibu, the sentencing court is entitled to take into consideration its own knowledge of the frequency of such cases coming to court.

As regards the punishment under s 457 of the Penal Code, it is not incorrect to say that some sentence of imprisonment is mandatory unless some such provisions in the Criminal Procedure Code as ss 173A, 294(i) are considered appropriate and resorted to, which the learned trial magistrate did not. I am of the view that the learned trial magistrate was justified in deciding that this was not a proper case to invoke s 294 of the Criminal Procedure Code. I also reject the plea of the appellant before me in this respect.

Housebreaking by night of other persons' dwelling houses in order to the commission of theft is considered a serious matter not only because of the intrinsic value of whatever is stolen but because of the intrusion into the houses which causes insecurity and fear to householders even in their own homes. The gravity of the offence is reflected by the provision of the imprisonment term which may extend to 14 years in the Penal Code. The

offence deserves fairly severe punishment and offenders must expect custodial sentences.

In the instant case, there is nothing wrong in the sentence either in the sense of its being illegal or of its being unsuitable to the admitted facts and circumstances of the case. Nor is there any valid ground for saying that it is manifestly excessive or severe. There is no ground for interfering with the sentence imposed. The appeal is dismissed and the six-month custodial sentence of the lower court is affirmed.

Appeal dismissed.

Reported by *Ng Sheau Jiuan*

Public Prosecutor v Mohd Nadzir bin Mohd Noor

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY CRIMINAL TRIAL NO 38 OF 1985
KC VOHRAH J
27 JULY 1988

Criminal Law – Drug trafficking – Prosecution evidence unequivocal as to where accused obtained the drugs – Cautioned statement containing incriminating and exculpatory parts – Weight of both parts – Exculpatory part and evidence negatived presumption of trafficking – Accused's behaviour consistent with innocence – Dangerous Drugs Act 1952, s 37(d)

The accused was charged with trafficking in 16.77 g of heroin under s 39B(1)(a) of the Dangerous Drugs Act 1952. The evidence was that the accused and W were riding on a motorcycle when they were stopped by a police patrol. When asked for his identity card, W ran away. The accused, however, parked the motorcycle and then threw a package (later found to contain heroin) from the motorcycle. Because the prosecution evidence was unequivocal as to where the accused had taken the package from, the deputy public prosecutor sought to admit the accused's cautioned statement. While a part of the cautioned statement clearly showed the accused admitting to the throwing of the package, another part contained an exculpatory portion which showed that the package was given to him by W and he was told to keep it. The accused did so, not realizing that it contained drugs.

Held, acquitting the accused: (1) The cautioned statement of the accused showed that the accused said the drugs belonged to W who ran away. W had given him the package and told him to keep it when W lifted the seat of the motorcycle and handed the package to him. Clearly, it would have been easier for the accused to run away as he was riding pillion but instead he parked the motorcycle and acted normally all the way through until he threw the package after realizing he had a package in his pocket and he believed it contained drugs. His behaviour prior to his throwing away the package was consistent with his innocence.

(2) The accused's cautioned statement and the evidence negatived the presumption under s 37(d) that he knew the nature of the thing under his control to be drugs.

Cases referred to
1 *Lim Yow Choon* v *PP* [1972] 1 MLJ 205 (refd)
2 *Soo Seng Huat* v *PP* [1968] 1 MLJ 80 (refd)
3 *Chee Chiew Heong* v *PP* [1981] 2 MLJ 287 (refd)

Legislation referred to
Dangerous Drugs Act 1952 ss 37(d), 37(da)(i), 37A

Zaini bin Abdul Rahman and *Abdul Alim Abdullah* (Deputy Public Prosecutors) for the Public Prosecutor.
Balwant Singh and *AS Sidhu* for the accused.

Cur Adv Vult

K C Vohrah J: The accused was charged as follows:

> That you on 17 February 1985, at about 12.20 am, at Jalan Motosikal of Batu 2½, Jalan Kelang Lama, in the federal territory of Kuala Lumpur did on your own behalf traffick in dangerous drugs, to wit, eight plastic packets of heroin weighing a total of 16.77 g and thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and punishable under s 39B(2) of the said Act as amended by Act A553.

Two police constables, PW3 and PW4, testified that they stopped a motorcycle on a motorcycle lane which led to Kuala Lumpur. This was on 17 February 1985 at about 12.20 am.

The motorcycle was travelling without lights. The rider of the motorcycle pulled up on a grass table separating the motorcycle lane leading to Kuala Lumpur from the motorcycle lane leading to Jalan Kelang Lama. When asked for his identity card the rider of the motorcycle ran away and was chased by two other policemen.

The pillion rider, the accused, on the other hand was still sitting on the motorcycle. He then got down and kept quiet. Then he stood up the motorcycle on its stand after which he himself stood to the left side of the motorcycle.

One policeman, PW3, stood in front of the motorcycle and faced the accused. The other policeman, PW4, was about ten feet from the rear end of the motorcycle facing the back of the accused.

According to PW4, two or three minutes after the accused had parked the motorcycle he saw the accused throw a package from the left side of the motorcycle to the right side and the package landed on the motorcycle lane leading to Kelang Lama. PW3, too, saw the accused do that. This package had eight plastic packets holding substances which on analysis by a government chemist, PW2, showed that they contained 16.77 g of heroin.

It was in evidence that the place where the police stopped the motorcycle was brightly lit, yet none of the policemen could tell where the accused had taken the package from. PW3 said that once in a while he glanced at the person who had run away implying he missed seeing the accused take the package from somewhere. PW3 stated that it was one minute after the accused had